

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	:	CRIMINAL ACTION
	:	
v.	:	
	:	
CARLOS TERRY	:	NO. 92-119-07

MEMORANDUM

Bartle, J.

March 20, 2014

Carlos Terry brings a petition for "common law writ of error coram nobis" seeking to overturn decades-old criminal convictions that resulted in the enhancement of an otherwise unrelated federal sentence that he is presently serving.

Terry was found guilty by a jury in this court in 1994 of conspiracy and various drug-related and firearms crimes. Because he had previously served sentences for a federal conviction dating from 1976 and a state conviction from 1986, the court determined him to be a career offender under the Sentencing Guidelines and sentenced him to 480 months in prison in January 1995. The Court of Appeals affirmed. U.S. v. Terry, 72 F.3d 125 (3d Cir. 1995). As a result of a motion he later filed under 28 U.S.C. § 2255, this court in 2000 vacated his sentence for carrying and using a firearm during a drug trafficking crime and reduced his sentence to 360 months. Petitioner is presently serving this reduced sentence.

Terry is now contesting as invalid his prior 1976 federal and 1986 state convictions. His sentences for these convictions have been served. Terry maintains, however, that they have wrongfully resulted in his career offender status and a more severe sentence for the federal offenses for which he is currently imprisoned. Coram nobis, which is reserved for exceptional circumstances, is available only when a person is attacking a sentence for which he is not in custody for purposes of 28 U.S.C. § 2255 but which nonetheless causes certain continuing collateral consequences. Obado v. New Jersey, 328 F.3d 716, 718 (3d Cir. 2003).

The Government argues that we lack jurisdiction to decide this petition because Terry is in federal custody. We disagree. The Supreme Court has held in the § 2254 context that a petitioner is not in custody with respect to a challenged but fully-served sentence that has been used to enhance criminal penalties that the petitioner is presently facing at the time of the petition. Maleng v. Cook, 490 U.S. 488, 492-93 (1989). We have been directed to no case, and we have discovered none, holding that a petitioner in custody for one conviction is necessarily in custody for previous convictions for purposes of § 2255. We therefore conclude that Terry is not "in custody" for purposes of 28 U.S.C. § 2255 with respect to the fully-served convictions he presently challenges.

This conclusion notwithstanding, coram nobis is not available in a federal court to attack a petitioner's prior state-court criminal judgments. Obado, 328 F.3d at 718; Lowery v. McCaughtry, 954 F.2d 422, 423 (7th Cir. 1992). Terry's attempt to challenge his 1986 state conviction through coram nobis in this court must therefore fail.<sup>1</sup>

We turn to Terry's 1976 federal conviction. The federal crimes for which Terry was convicted, which were committed in July 1975, involved the assault of a postal employee in violation of 18 U.S.C. §§ 111, 1114 and 2 (Count I of the indictment) and theft of government property during a robbery of a post office with a sawed-off shotgun in violation of 18 U.S.C. §§ 641 and 2 (Count II of the indictment). Terry was additionally charged with assaulting a person in possession of government property with intent to take that property in violation of 18 U.S.C. §§ 2114 and 2 (Count III of the indictment) and assaulting a person at a post office with intent to take a thing of value from that person in violation of 18 U.S.C. § 113(b) (Count IV of the indictment) as those statutes

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<sup>1</sup> We note in passing that Terry nowhere supplies the basis for his challenge of his state conviction beyond stating simply that "he would not have pled guilty in this matter, had defense counsel explained the collateral consequences and the continuing penalties associated with taking the plea."

existed in 1975. Counts III and IV were dismissed as part of Terry's negotiated plea.<sup>2</sup>

Terry is now seeking coram nobis relief based on a claim of ineffective assistance of counsel at that time. U.S. v. Terry, Crim. Action No. 75-525 (E.D. Pa.). In his pending petition, he specifically alleges that his lawyer advised him incorrectly some 37 years ago that he faced a 25-year sentence for possessing a sawed-off shotgun, a longer sentence than he says the law allowed and that he pleaded guilty for that reason.

We have reviewed the transcripts of the April 7, 1976 change of plea hearing and the May 7, 1976 sentencing hearing before the late Judge Clarence C. Newcomer. The sentence of 10 years on Count I and 5 years' probation on Count II to run consecutively to the sentence on Count I, paired with the dismissal of Count III and Count IV, was the subject of a negotiated plea which Judge Newcomer accepted. At the change of plea hearing, Terry was advised that the maximum sentence on Count I was 10 years, on Count II 10 years, on Count III a mandatory sentence of 25 years, and on Count IV a sentence of 10 years. Accordingly, the maximum total sentence that could have been imposed was 55 years. Terry also said he understood the negotiated plea and that he

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<sup>2</sup> Terry's codefendant, David Johnson, was charged on Counts I through III only. Johnson pleaded guilty and was convicted on Count I and Count II. Count III was dismissed as to Johnson as part of his plea arrangement.

recognized that it was "in his own best interest" to accept it. He explained he wanted to change his plea to guilty on Count I and Count II "because the truth of the matter, I am guilty."

Terry was clearly advised during the change of plea hearing as to the maximum possible sentence on each count. The total clearly exceeded the 25 years his lawyer allegedly told him. Consequently, he has suffered no harm.

Finally, we note that Terry has delayed his present coram nobis petition for over 18 years after the imposition in 1995 of his current federal sentence. Fortunately in this case, the court records from the 1975-76 era still exist which enable us definitely to resolve the issue raised.<sup>3</sup> See U.S. v. Osser, 864 F.2d 1056, 1061-62 (3d Cir. 1988).

Accordingly, Terry's petition "for common law writ of error coram nobis" will be denied.

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<sup>3</sup> We note tangentially that paging through the yellowed records from decades past is the exact sort of exercise that the Supreme Court has sought to avoid in limiting post-conviction remedies in the name of finality. Daniels v. United States, 532 U.S. 374, 379 (2001).

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ORDER

AND NOW, this 20th day of March, 2014, for the reasons set forth in the accompanying Memorandum, it is hereby ORDERED that the petition of Carlos Terry "for common law writ of error coram nobis" (Doc. #124) is DENIED.

BY THE COURT:

/s/ Harvey Bartle III

J.